

GEORGE H. GRAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fee of C. James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fee (89-LHC-216) of Administrative Law Judge James W. Kerr, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a retired electrical supervisor who worked for employer filed a claim for noise-induced hearing loss on December 31, 1986. On August 6, 1987, employer initiated voluntary payment of compensation for an 11.8 percent binaural hearing loss. The case was referred to the Office of Administrative Law Judges for a formal hearing on October 14, 1988. On October 19, 1989, employer made a voluntary lump sum payment of \$4,682.71 for an 11.8 percent binaural hearing loss calculated pursuant to 33 U.S.C. §908(c)(13)(B) based upon an average weekly wage of \$297.06.

In his Decision and Order, the administrative law judge averaged the audiograms of record

and determined that claimant suffered from a 14.55 percent binaural impairment. He then determined that as claimant was a retiree, his benefits must be calculated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). Accordingly, he converted claimant's 14.55 percent binaural hearing impairment to a 5 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), and awarded him compensation based on an average weekly wage of \$302.66.<sup>1</sup> He also awarded claimant medical benefits, interest, and an assessment under Section 14(e), 33 U.S.C. §914(e).

Subsequently, claimant's counsel submitted a fee petition to the administrative law judge, requesting \$3,189 for 25.25 hours of services at \$125 per hour, and \$32.50 in expenses. Thereafter, employer filed objections. Claimant replied to employer's objections. In a Supplemental Decision and Order Awarding Attorney's Fee, the administrative law judge reduced the requested hourly rate for non-trial work to \$100, and disallowed 6.125 of the hours claimed. Accordingly, he awarded claimant's counsel a fee of \$2,032.75, representing 16.875 hours of services at \$100 per hour, 2.5 hours of services at \$125 per hour, plus the \$32.75 in requested expenses.

On appeal, incorporating the objections it made below, employer challenges the fee award made by the administrative law judge on various grounds. Claimant, incorporating his reply brief below into his brief on appeal, responds, urging affirmance of the administrative law judge's fee award.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fees because the \$4,682.71 it tendered prior to referral and then voluntarily paid claimant pursuant to Section 8(c)(13)(B) resulted in an overpayment, in that at the \$10.09 weekly rate awarded under Section 8(c)(23), no benefits will be due until 1996. In the alternative, employer contends that the fee awarded by the administrative law judge is excessive. Employer maintains that consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal, or at least a substantial reduction, of the fee awarded. Moreover, employer argues that the amount of the fee awarded was not properly tailored to claimant's partial or limited success before the administrative law judge. We need not address these arguments, however, as they have been raised by employer for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28

BRBS 102 (1994), *aff'd in part, part mem. sub nom., Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

Employer also argues that any fee awarded under Section 28(b) should have been limited solely to the difference between the amount of benefits voluntarily paid by the employer and the amount ultimately awarded by the administrative law judge. We disagree. Inasmuch as the Board

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<sup>1</sup>No party has challenged the award of compensation benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988). Cf. *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993)(all hearing loss is properly compensated pursuant to 33 U.S.C. §908(c)(13)).

has consistently rejected the contention that the amount of the fee awarded under Section 28(b) must be limited in the manner urged by employer, the administrative law judge properly rejected employer's objection in this regard. *See e.g., Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting)(Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Employer further contends that the hourly rates awarded to claimant's counsel do not conform to reasonable and customary charges in the area and that an hourly rate of \$80 to \$85 for claimant's lead counsel and \$70 to \$75 for claimant's associate counsel would be more appropriate. We disagree. Employer's unsupported assertions are insufficient to meet its burden of establishing that the hourly rates awarded are unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).<sup>2</sup>

Employer additionally objects to counsel's use of the minimum quarter-hour billing method and to specific itemized entries on various dates involving the preparation or review of routine correspondence. The administrative law judge in the present case determined that counsel's minimum quarter-hour billing method was acceptable. Our review of counsel's fee petition, however, indicates that it generally conforms to the guidelines set forth in *Ingalls Shipbuilding, Inc. v. Director OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpublished), and *Ingalls Shipbuilding, Inc. v. Director OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990)(unpublished), that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for writing a one-page letter. The one-quarter hour entries for services performed on March 8, 1990, for receipt and review of a one page letter from employer's counsel to the administrative law judge and on March 12, 1990, for receipt and review of a letter from employer's counsel to the administrative law judge regarding social security records, however, are excessive under the aforementioned criteria. Accordingly, we modify the administrative law judge's fee award to reflect the reduction of these two entries from one-quarter to one-eighth of an hour each consistent with *Biggs* and *Fairley*. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

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<sup>2</sup>Employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

Employer also contests the number of hours requested by counsel and approved by the administrative law judge, contending that time spent in certain discovery-related activity, in file review, in trial preparation and attendance, and in preparing a post-hearing brief was either unnecessary, excessive, or clerical in nature.<sup>3</sup> In considering counsel's fee petition, the administrative law judge specifically considered employer's objections to itemized entries, and employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion. Accordingly with the exception of the reduction in the quarter-hour entries previously discussed, we decline to reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is modified to reflect the reduction of two entries from one-quarter to one-eighth of an hour each. Counsel is therefore entitled to a fee of \$1,975 for work performed before the administrative law judge, representing 16.625 hours at \$100 per hour, 2.5 hours at \$125 per hour, and \$32.75 in expenses. In all other respects, the decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>3</sup>Additionally, we reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (September 5, 1991), as fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. 33 U.S.C. §928(c); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).